United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL WITH PROOF OF SERVICE

76-1227

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

CHRISTOPHER WILLIAMS,

Appellant.

ON APPEAL FROM A JUDGMENT AND COMMITMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES CITED

OTHER AUTHORITY CITED

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DOCKET NUMBER: 76-1227

UNITED STATES OF AMERICA,

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-against-

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APPELLANT'S BRIEF

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Court below err in permitting the introduction of testimony about three unrelated drug transactions involving the defendant? Was this error compounded where the prosecutor's summation emphasized that such evidence established that the defendant's business was cocaine dealing?

2. Was the Court's charge to the jury inadequate on the issue of accomplice testimony and confusing on the definition of reasonable doubt?

3. Was the error of prejudicial variance committed when the evidence established that the defendant did not plan or participate in a second conspiracy which had, as one of its ends, the purpose of excluding him from participation?

STATEMENT OF THE CASE

The defendant-appellant was convicted in the Eastern District of New York for violation of the Federal Narcotics Law. The trial was held before Hon. John F. Dooling, Jr., and a jury.

Defendant was convicted of two substantive counts (Counts 1 and 2) of violation of Title 21 U.S.C. §841 (a) (1) and conspiracy under TItle 21 U.S.C. § 846. Charges under Counts 3, 4 and 5, which were also substantive possession charges, were dismissed by the Court.

Judge Dooling sentenced defendant appellant to five years in prison but stayed execution of the sentence pending this appeal. The defendant is incarcerated, however, on an unrelated charge in the State of North Carolina.

The defendant-appellant was granted leave to appeal as an indigent and the case is being heard on the original record.*

The appeal is from the judgment of conviction.

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* References to the record on appeal will be given by page number, thus (57).

THE TESTIMONY

HARRY HARALAMBUS ("HARRY") had a friend named FABELLA (29). In December, 1973, FABELLA told HARRY he had a source for cocaine and asked him if he wished to do business in cocaine (30). (A defense objection to FABELLA-HARRY conversations was met with the Court's instruction to the jury that such conversations were not "in any way connected with the defendant"[30]).

HARRY called his cousin, PETER MIKEDES, in Washington, D.C. and informed him that he might have a possible source for cocaine (31). FABELLA delivered a sample which HARRY "tested" by snorting it, burning it in tin foil, dropping it in water and "cutting" it (31). HARRY claimed to have done these tests previously (32).

THE FIRST QUARTER-POUND CONSIGNMENT

HARRY told FABELLA he would get back to him if he was interested and that he would probably want one-quarter-pound of cocaine (34). HARRY thereafter called MIKEDES in Washington and told him that it was good quality cocaine (33). MIKEDES said he'd been in touch if interested and a week later MIKEDES arrived in New York with WILLIAM "BEBE" MORTON and CARMEN BONITA (34).

MORTON, BONITA and HARRY discussed the deal they would make for one-quarter-pound of cocaine and themselves tested the sample (34).

HARRY thereupon met with FABELLA and his supplier, LEONARD DURSO. DURSO outlined a deal whereby he would supply HARRY with one-quarter-pound of cocaine at his cost -- around $3,300.00. After it was sold the profits would be split, DURSO to get half the profit which he approximated at $1,700.00, the balance of the profit to go to HARRY (36).

Back at his own apartment HARRY outlined the substance of DURSO'S proposal to MORTON, MIKEDES and BONITA (36). MIKEDES and MORTON called Washington and spoke to "CW" discussing rock groups and not mentioning cocaine (38) MIKEDES later told HARRY that this was a code wherein rock groups were a substitute word for cocaine (38). After the telephone conversation MIKEDES asked HARRY where the nearest Western Union Office was located (39). They went there and BONITA picked up and gave to HARRY $3,300.00 which had been wired to her (42).

HARRY gave this $3,300.00 to DURSO and received a quarter-pound of cocaine (42). MORTON, MIKEDES and HARRY tested it with water, burned some on tin foil and dropped it in Clorox (42). They snorted some and concluded that it

was excellent quality cocaine (43). BONITA took the cocaine to Washington (43).

Three or four days later FABELLA and DURSO came to HARRY'S home seeking the profit on this initial transaction and anxious to discuss potential future deals (44). MIKEDES called "CW" in Washington. MIKEDES' end of the conversation was again coded in terms of rock groups (45). MIKEDES told them that "CW" said he hadn't even gotten the cocaine yet, that perhaps BEBE or BONITA had cut it (45).

DURSO was pursuing HARRY and MIKEDES for the profit on the first transaction and again mentioned the potential for future transactions (45). HARRY and MIKEDES met with BEBE MORTON at Betty Gage's apartment and BEBE opined that either the defendant or BONITA were "messing around" (46).

THE SECOND QUARTER-POUND CONSIGNMENT

At the meeting at Betty Gage's apartment, between HARRY, MIKEDES and BEBE MORTON, MORTON discussed how the three of them could continue to do business with DURSO and how MORTON would come up with his own money to purchase additional cocaine (46). Specifically, MORTON said that he had access to pharmaceutical cocaine in Philadelphia which he could bring to New York to sell and that the funds from that could be used to purchase additional cocaine (47). MORTON then left Betty Gage's apartment.

MORTON returned to Gage's apartment with seven or eight bottles of pharmaceutical cocaine but stated to HARRY and MIKEDES that he would be unable to use all of the money received by him for selling that cocaine to buy more cocaine from DURSO (48). MORTON then contacted his wife, who flew to New York the following day (48). MORTON handed his wife an envelope, she went to the bathroom and then came back and handed the envelope to MORTON. MORTON gave the envelope to HARRY; inside was $3,300.00 (48).

HARRY thereupon called DURSO, met him and gave him the $3,300.00 that MORTON had supplied (49). HARRY and DURSO discussed the fact that DURSO was still owed the profit on the first quarter-pound and now would also be owed profit on the second quarter-pound (49). Actual delivery of this second quarter-pound of cocaine was accomplished through MIKEDES, who brought it to HARRY'S apartment (51-2). This second shipment was tested by similar methods as the first (51).

MORTON said they should not take the cocaine back to Washington, but should rather try to sell it in New York (53). However, when HARRY and MORTON went to a potential customer named Pearl, she declined to purchase it on the grounds that it was of poor quality (54). HARRY and MIKEDES approached DURSO about returning this second shipment to him because of the poor quality, DURSO responded by striking MIKEDES and demanding his money (53).

MORTON then directed the cocaine be cut into quarter and half-ounce lots and MORTON took it to retail it in New York City (56).

For the next two months HARRY couldn't reach MIKEDES or BEBE MORTON (57). HARRY was avoiding DURSO who believed he was owed $3,400.00 (his share of the profit on the two quarter-pound consignments) (56).

THE SUBSEQUENT TRANSACTIONS WITH DURSO

There were three subsequent purchases through DURSO. As the Court below quite properly dismissed Counts against the defendant relating to these transactions, they will be covered only in skeletal detail.

In April of 1974, HARRY finally met with DURSO who said that he had large quantities of cocaine to sell which he wanted HARRY to re-sell outside of the New York area and DURSO gave HARRY another quarter-pound of cocaine (59). HARRY called MIKEDES and went to Washington with this cocaine (62).

HARRY and MIKEDES made plans to retail this cocaine in the Washington area and HARRY actually sold an ounce of cocaine to a total stranger whom he met in a bar (63).

The following day, as MIKEDES and HARRY were driving through Washington, they encountered the defendant, entirely by accident (64). MIKEDES introduced HARRY to the defendant, who had never previously met (64). HARRY and WILLIAMS reviewed the earlier transactions and the defendant stated that he had never seen or touched either of the first two quarter-pounds of cocaine and said that "BEBE was supposed to take care of everything." (64-5).

HARRY gave the defendant the balance of the third quarter-pound of cocaine (less what he had sold previously) (67). A few days later the defendant gave HARRY most of the money that was due on the previous outstanding transactions (68).

HARRY thereafter returned to New York, bought a fourth quarter-pound from DURSO, returned to Washington and turned it over to the defendant (68-70). The defendant gave him money, which HARRY carried back to New York and gave to DURSO (70-1).

DURSO then gave HARRY a half-pound of cocaine (72). When HARRY protested about the poor quality of this fifth consignment, DURSO got upset and yelled about the money that was still owed to him (72).

HARRY and a friend, Rudinsky, took this half-pound to Washington and gave it to the defendant (75-6). The defendant paid

by giving HARRY $1,000.00 in cash and 45 pounds of marijuana (76). HARRY returned to New York, sold the marijuana, contacted DURSO and gave him anywhere from $7,000.00 to $12,000.00 (76-7). DURSO discussed how much money was still owed him (77).

HARRY returned to Washington (again accompanied by Rudinsky) and requested that the defendant pay what he owed (77). Although HARRY pressed WILLIAMS, he never got any more money from him (79).

HARRY HARALAMBUS' HISTORY

Cross-examination revealed that HARRY, while in the Marine Corps, had been a psychiatrist because he was badly depressed, was ignoring orders, was irritable and having night-mares (89). The doctor prescribed thorazine (89). HARRY also used opium and marijuana while in the military, as well as LSD, DNT, TCP and liquor. (91,3,5). He was court-martialed for going A.W.O.L. and for threatening a seargeant, and was fined and reduced in rank (92).

While in the service, HARRY was in frequent contact with a psychiatrist. He was hallucinating and having "bad trips" (93-4). He never saw a doctor after his discharge from the service (101-2).

HARRY was convicted of attempting to transport drugs across the border (103). In April, 1973, he was charged with conspiracy to manufacture and distribute amphetamines, although that case

was dismissed (105-9).

HARRY became a Drug Enforcement Administration informant in October of 1973 (125). He was an informant when he met FABELLA and DURSO and engaged in the transactions involved in this trial, although he did not tell the Government agents about the sales while they were happening (126). It wasn't until July, 1974 that he told the Government agents about the drug dealings because he was "fed up with things" and because DURSO was putting great pressure on him (129). Ultimately, even after he told the D.E.A., DURSO assaulted and injured HARRY in September, 1974 (131).

HARRY hasn't been prosecuted for these crimes and doesn't know if he will be (133).

MIKEDES' TESTIMONY

PETER MIKEDES testified that he had first met the defendant in 1972-3 through CARMEN BONITA, who was employed at MIKEDES' parents' restaurant. (178). MIKEDES bought cocaine from the defendant (178).

Around Christmas, 1973, MIKEDES heard from his cousin HARRY who said that he had one-quarter pound of cocaine to sell and HARRY asked MIKEDES if he knew someone to buy it (179). MIKEDES contacted the defendant and went to his apartment where he met WILLIAMS and BONITA (179). WILLIAMS told MIKEDES that WILLIAM "BEBE" MORTON would go with MIKEDES and BONITA to New York

and to check the quality of the cocaine (181).

MIKEDES, BONITA and MORTON went to New York, met HARRY and tested the cocaine (181-2). MIKEDES called WILLIAMS and spoke about musicians, the quality of the group, etc., which was a code by which MIKEDES described the quality of the cocaine (183).

WILLIAMS wired the purchase price ($3,375) to New York, via Western Union, in BONITA'S name (183-5). HARRY then obtained the quarter-pound of cocaine, which was tested, and MIKEDES reported the quality thereof to WILLIAMS, by telephone, using the same "musicians" code (185). BONITA carried the cocaine to Washington that day (186).

A few days later, MIKEDES and HARRY met with DURSO and FABELLA and discussed the potential for future drug transactions between them (186). No money or word came from the defendant.

MIKEDES called defendant WILLIAMS in Washington to ask what was holding up the profits on the first consignment and WILLIAMS replied that he hadn't seen MORTON yet (187). DURSO was becoming impatient and, when MIKEDES complained that the first consignment had been of poor quality, DURSO hit him (188).

MIKEDES again called the defendant and insisted he bring the money to pay for the first consignment to New York (188). WILLIAMS came to New York and collected a money order from Western Union which he gave to MIKEDES to pay for the first transaction (189-90).

Thereafter, MIKEDES met with HARRY and "BEBE" MORTON at Betty Gage's apartment to discuss the purchase of a second consignment of cocaine. MORTON had several bottles of pharmaceutical cocaine with him, which he said he would sell to finance the purchase of the second consignment of cocaine from DURSO (190). The proceeds of the sale of MORTON'S pharmaceutical cocaine turned out to be insufficient (because MORTON used part of it to pay other outstanding debts). MORTON therefore had his wife fly to New York with enough money to make up the difference.

MORTON'S money (from the sale of pharmaceutical cocaine and that supplied by his wife) was given to DURSO for the second quarter-pound of cocaine, which DURSO delivered to MIKEDES (191-2). They tested this second batch, which was of inferior quality, and called the defendant in Washington to tell him about it (192).

They decided to sell the second batch in New York, but a potential customer, Pearl, declined to buy it because of its inferior quality (193). They sold most of it in New York and the last ounce or two were taken by MIKEDES down to Washington (193).

MIKEDES gave the remnant of the second consignment to defendant WILLIAMS who gave him $1,400.00 for it, which MIKEDES wired to HARRY in New York (193).

Some months later, MIKEDES was driving HARRY around Washington and they encountered the defendant, entirely fortuitously (194). HARRY had a quarter-pound of cocaine with him which he and the defendant discussed "moving" and whether HARRY would take marijuana in payment therefore (194).

CROSS-EXAMINATION disclosed that the time the defendant came to New York it was solely to get money from Western Union and give it to BEBE MORTON for payment for the first consignment (211).

Further, it emerged that when MIKEDES sold WILLIAMS the remaining cocaine from the second consignment, the defendant paid MIKEDES the retail price for the quality of cocaine he received. Thus, it was a direct sale of the ounce and a half of cocaine (215-17).

RUDINSKY ADDS LITTLE

PAUL RUDINSKY was not involved in either the first or second transactions. In June, 1974, RUDINSKY took HARRY to the airport and saw HARRY in possession of a quarter-pound of cocaine (234). On another occasion, RUDINSKY went with HARRY to Washington and went to the apartment of a Mr. Williams -- but RUDINSKY could not identify the defendant as the Williams whom HARRY met (233). HARRY was asking Williams for money, which he didn't get (234). A re-play of this incident occurred on another occasion when RUDINSKY was present in Washington (235).

MORTON'S STORY

WILLIAM "BEBE" MORTON met defendant WILLIAMS in June of 1973, through Charles Lewis (258). MORTON had given Lewis cocaine to sell which was of very poor quality and Lewis couldn't sell it. (258). MORTON'S supplier wanted the cocaine back (or the money for it). (259) Lewis came to MORTON'S store and took MORTON outside where MORTON saw the defendant return the poor quality cocaine to Lewis who in turn gave it to MORTON(259). A defense objection to this line of questioning was over-ruled (259).

On another occasion a friend of MORTON'S "wanted to know if I knew someone who could handle a package of cocaine". (261). MORTON contacted defendant WILLIAMS and gave him the friend's cocaine for which the friend was supposed to receive $3,000.00 (261). The defendant never paid for that cocaine and MORTON ultimately paid his friend $1,000.00 from his own funds (262).

Turning to the incidents covered in this indictment, MORTON testified that he was in the defendant's apartment with MIKEDES, whom he had not previously known (263). Arrangements were made to go to New York to get cocaine, which MORTON, MIKEDES and BONITA did, the following day (265).

They proceeded to HARRY HARALAMBUS' apartment where HARRY produced a sample of cocaine. They tested it and concluded that

it was of good quality (266). MIKEDES called WILLIAMS, told him about the sample and made arrangements for WILLIAMS to forward the purchase price to Western Union, in BONITA'S name (269).

The following day, MIKEDES, BONITA and HARRY met MORTON and told him they'd been to Western Union and gotten the money (269). They went to HARRY'S house, he left, came back shortly thereafter with a quarter-pound of cocaine which again they tested (269-70). BONITA transported the cocaine to Washington, concealed on her body (270). In Washington, MORTON and BONITA went to the defendant's apartment and gave him the cocaine (271).

Two or three weeks after this, MORTON came back to New York. On the way up he stopped in Philadelphia and made arrangements to purchase pharmaceutical cocaine (272).When he arrived in New York MORTON went to Betty Gage's apartment on 23rd Street in Manhattan (272). As MORTON was entering Gage's apartment defendant WILLIAMS was leaving and they passed each other (275).

MORTON sold the Philadelphia pharmaceutical cocaine to a customer named Hackett but was short $1,000.00 for the second cocaine purchase (275). MORTON thereupon called his wife to come to New York with $1,000.00, which she did (276).

MORTON turned the money over to HARRY HARALAMBUS and he returned with the second quarter-pound of cocaine (277). They decided to try to sell this cocaine in New York and MORTON contacted a friend named Rick Daniels, who put MORTON in touch with a potential purchaser named Pearl (277-8). Pearl tested it and rejected it as poor quality merchandise (278).

MORTON, MIKEDES, HARALAMBUS and DANIELS tried to sell it through HARRY'S connections in New York over a one month period (279). They sold about two ounces in New York and MIKEDES ultimately took the remaining two ounces to Washington (279). After this, MORTON had no significant contact with either MIKEDES or the defendant (279-80).

COURT'S RULINGS DISMISSING COUNTS THREE, FOUR AND FIVE

The Court heard extended argument on the defendant's motion to dismiss the third, fourth and fifth counts of the indictment. (299-309). These three counts dealt with instances where HARALAMBUS purchased drugs from DURSO in New York, took them down to Washington and sold them directly to the defendant, according to HARALAMBUS. The Court ruled that there was no nexus between the defendant's acts and the venue of the Court and therefore dismissed those counts of the indictment.

The Court declined, however, to dismiss the first and second substansive counts or the conspiracy charge. (309).

PROSECUTOR'S SUMMATION

The prosecutor's summation contained numerous references to crimes not charged in the indictment. Thus early on the prosecutor noted:

> What do you know about Mr. Williams? The answer is he is a man that dresses fairly well as you can see there from looking at him for three days. We know he ran a nightclub in the suburb of Washington called the Coral Reef. We know that he has various rock groups coming in.
>
> We don't know how successful he was in that business. Be we do know something about the other business he was in. We know from the testimony that he was dealing in cocaine (318).
>
> * * * * * *
>
> Now, what has the evidence in this case showed?
> We know that Mr. Morton had met Mr. Williams several months prior to Christmas of 1973, when Mr. Williams returned some cocaine to a gentleman that Mr. Morton knew. And we know just prior to Christmas, 1973, Mr. Morton got a hold of Mr. Williams and told him that this friend of his who owned a gas station had some cocaine and if he could get rid of it, he would like him to do so. Mr. Williams agreed and took the cocaine

and, he was going to pay back Mr. Morton's friend $3,000.00. We also know at least, Mr. Morton never got any money on behalf of his friend, in fact he had to pay $1,000.00 out of his own pocket to his friend at the gas station. So, that is how the state in which the defendant Mr. Williams comes into the evidence that we are concerned about in this trial (323).

THE COURT'S CHARGE

The Court defined reasonable doubt to the jury as follows:

> Proof beyond a reasonable doubt is not proof to an absolute certainty. Few things in life can be so proved. Proof beyond a reasonable doubt is such proof as you would be willing to rely and act upon in the most important of your own affairs. If, after carefully weighing all the evidence you have an abiding conviction of the truth of the charge such that you feel conscientiously bound to act upon it, then you would be free from reasonable doubt. If, however, after weighing all the evidence, you have such a doubt as would cause prudent men to hesitate before acting in matters of importance to themselves, such a doubt would be a reasonable doubt (387).

The Court discussed accomplice testimony by stating:

> An accomplice does not become incompetent as a witness because of his participation in the criminal acts charged. On the contrary, if the only evidence on some or all of the essential elements of any Count is the testimony of an accomplice, it may still be of sufficient weight, if you believe it, to ascertain a verdict of guilty without corroboration in or support of other evidence. Yet bear in mind that accomplice testimony is to be received with caution and weighed

with care. You should not convict on unsupported accomplice testimony unless you believe that testimony beyond a reasonable doubt. (393).

THE VERDICT

The defendant was convicted of the first, second and sixth counts of the indictment.

POINT I

THE INTRODUCTION OF TESTIMONY ABOUT THREE TOTALLY UNRELATED DRUG TRANSACTIONS DEPRIVED DEFENDANT OF A FAIR TRIAL

a) THE TESTIMONY

Both MIKEDES and MORTON testified to drug transactions with the defendant which were totally unrelated to any of the charges on which the defendant was tried.

MIKEDES testified that the defendant sold him cocaine in Washington D.C. (178).

MORTON described two unrelated drug transactions involving the defendant at great length. The first transaction involved MORTON, the defendant and one Charles Lewis. MORTON had given Lewis poor quality cocaine to sell (258). MORTON'S supplier began pressing him for either the money from the sale or the return of the cccaine, a request that MORTON transmitted to Lewis (259). Lewis thereupon brought the defendant to MORTON'S store and, in MORTON'S presence, the defendant gave the cocaine to Lewis who gave it to MORTON (who presumably returned it)(259). A defense objection to this testimony was over-ruled (259).

MORTON testified about another incident in which a different friend had cocaine to sell. MORTON took the cocaine from his friend and gave it to the defendant (261). The price

was $3.000.00, but the defendant kept the drugs and did not pay MORTON. MORTON ultimately gave his friend $1,000.00 out of his own pocket. (262).

b) THE HIGHLIGHTING OF THESE UNRELATED DRUG TRANSACTIONS

The prosecutor argued, on summation, that the defendant was a drug dealer. This was the use that was made of the testimony about the other drug transactions.

The prosecutor initially noted that Williams owned a nightclub and then stated:

> We don't know how successful he was in that business. But we do know something about the other business he was in. We know from the testimony that he was dealing cocaine (318).

Lest the jury not recall the substance of MORTON's testimony about his prior drug transactions with the defendant, the prosecutor repeated them at length and in detail. He then tied that all together by stating:

> So, that is how the state in which the defendant, Mr. Williams comes into the evidence that we are concerned about in this trial (323).

c) THE LAW

It has been frequently noted that evidence of other crimes is inadmissable if offered to prove the defendant's prior criminal propensity or criminal pre-disposition. Indeed, such

evidence is sometimes excluded where its highly prejudicial nature exceeds its legitimate probative value. United States vs. Santiago, 528 F.2d 1130, 1134, (2d Cir.), cert., denied, 96 S.Ct., 2169 (1976); United States vs. Papadakis, 510 F.2d 287 (2d Cir., 1975); United States vs. Chrzanowski, 502 F.2d 573 (3d Cir., 1974); Boyd vs. United States, 142 U.S. 450 (1892) and Rule 404 (b) of the Federal Rules of Evidence.

There have been recognized judicial exceptions to the general proscription of proof of other crimes, but none of them is applicable here. Thus, these other crimes shed no light on motive or identity. They did not prove a common scheme or plan under which this Court permitted such evidence to be introduced in United States vs. Papdakis, supra, nor did they show the basis of the conspiracy count, as in United States vs. Torres, 519 F.2d 723, 727 (2d. Cir., 1975)

It is possible that the Government will, on this appeal, proffer one of the exceptions to the rule excluding evidence of prior crimes, as justification for the introduction of that testimony in this case. The ingenuity of appellate counsel in pointing out a possible technical basis for admissability, however, should not close the Court's eyes to the realities of what happened in the Courtroom below where the case was tried.

We submit that there must be a two-fold test in appellate review of prior crime testimony. The first consideration

should be the value of such evidence to the prosecution in the particular case, as measured by the need for such prior crime evidence and weighed with the other evidence in the case. Cf. United States vs. Brettholz, 485 F.2d 483 (2d Cir., 1973) and United States vs. Bozza, 365 F.2d 213 (2d Cir., 1966). In this case, there was no legitimate purpose for which the prosecution sought to prove drug dealing by the defendant in Washington, D.C.

The other test is the actual use that the prosecution made of the prior crime evidence. Here, reading the prosecutor's summation, it is clear that the prior crime evidence proof was used for exactly the wrong proposition -- the argument that this defendant was a cocaine dealer.

The jury was invited to convict the defendant not because of his guilt of the crimes here charged but rather because he was one who dealt in drugs. Whatever legitimate reason there might have been for the introduction of prior crimes was totally lost when the prosecutor's improper argument was made.

In view of the introduction of evidence of three unrelated crimes and the prosecutor's argument that these proved that the defendant was in the "cocaine dealing business" the defendant was deprived of a fair trial.

POINT II

THE COURT'S CHARGE ON ACCOMPLICE TESTIMONY WAS INADEQUATE; THE CHARGE ON REASONABLE DOUBT WAS CONTRADICTORY AND CONFUSING

The Court charged the jury regarding accomplice testimony as follows:

> An accomplice does not become incompetent as a witness because of his participation in the criminal acts charged. On the contrary, if the only evidence on some or all of the essential elements of any Count is the testimony of an accomplice, it may still be of sufficient weight, if you believe it, to ascertain a verdict of guilty without corroboration in or support of other evidence. Yet, bear in mind that accomplice testimony is to be received with caution and weighed with care. You should not convict on unsupported accomplice testimony unless you believe that testimony beyond a reasonable doubt. (392-3).

This charge did not adequately inform the jury of the danger of accomplice testimony. While the Court did mention that such testimony should be "received with caution and weighed with care" its ultimate caveat was merely that such testimony had to be believed beyond a reasonable doubt to convict. No mention was made of the dangers inherent in accomplice testimony and the cautionary part of the instruction was but a single sentence.

United States vs. Padgent, 432 F.2d 701 (2d. Cir., 1970), deals with the inherent dangers of accomplice testimony, albeit in the context of reviewing the lower Court's limitation of cross-examination. The reasoning of this Court is instructive on the weight to be accorded such evidence an accomplice's testimony

was held to be "inherently suspect" because he may:

> have an important stake in the outcome of the trial. An accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony.
>
> United States vs. Padgent, supra, at 704.

Indeed charges in Padgent language have been approved by this Court, see United States vs. Projansky, 465 F.2d 123, 136 (n.25) (2d Cir., 1972) and United States vs. Gonzalez, 488 F.2d 833 (2d Cir., 1973).

A very recent case from this Court on the proper accomplice charge specifically held that Padgent language is not mandatory. But the trial Court's warning in United States vs. Bermudez, 526 F.2d 89 (2d Cir., 1976) was that:

> the jury should keep in mind that such testmony is always to be received with caution and weighed with great care. [The accomplices'] testimony is not to be considered by you as you might consider any ordinary layman's testimony. You must recognize that they say they participated in the crime charged.

In sanctioning that charge this Court was quick to point it was "satisfied that the charge in this case fairly apprised the jury of the pitfalls of relying upon an accomplice's testimony, and we sustain it on that basis" at page 99 of the Bermudez decision.

It is submitted that the trial Court here did nothing to apprise the jury of the pitfalls of accomplice testimony and thus, on that basis, the conviction must be set aside.

The Court below defined reasonable doubt in contradictory terms. First the Court stated that "Proof beyond a reasonable doubt is such proof as you would be willing to rely and act upon in the most important of your own affairs." (387). Thereafter, reasonable doubt was defined as "such a doubt as would cause prudent men to hesitate before acting in matters of importance to themselves..." (387).

The first portion of the definition "willing to rely and act upon" was condemned by the United States Supreme Court two decades ago in Holland vs. United States, 348 U.S. 121, 140 (1954). This Court has consistently disapproved the "willing to rely and act upon" definition of reasonable doubt. See United States vs. Acarino, 408 F.2d 512 (2nd Cir.), cert. denied 395 U.S. 961 [1969]) and United States vs. Nuccio, 373 F. 2d 168, 174-5, (2d Cir., 1967).

POINT III

THE COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION TO DISMISS THE SECOND COUNT OF THE INDICTMENT AS NOTHING THE DEFENDANT DID IN CONNECTION WITH THAT TRANSACTION HAD ANY NEXUS WITH NEW YORK AND HE WAS NOT PART OF THE CONSPIRACY THAT PLANNED IT.

1) The First Transaction - The HARALAMBUS-MIKEDES-WILLIAMS-MORTON-BONITA Conspiracy.

At the end of 1973 HARALAMBUS contacted MIKEDES, MIKEDES brought in WILLIAMS and WILLIAMS enlisted MORTON and BONITA. WILLIAMS put up the "front money" for the purchase of the cocaine in New York. The drug was transported by BONITA to Washington and there given to the defendant. The witnesses agreed that WILLIAMS was not forthcoming with either information or the profits on the sale of this first quarter-pound and they all were angry with him.

2) The Second Transaction - The HARALAMBUS-MORTON-MIKEDES-Conspiracy.

A fair reading of the testimony of these three witnesses makes it clear that they were quite unhappy with MR. WILLIAMS' participation in the first transaction and they decided, among themselves, to undertake future deals without WILLIAMS' participation.

HARALAMBUS' testimony was the the second transaction was discussed at Betty Gage's apartment, in Manhattan, at a meeting attended by HARALAMBUS, MIKEDES and MORTON. There were recriminations about the first transaction and MORTON opined that "someone was messing around" and that it was either the defendant or BONITA (46).

It was clear, however that the second purchase was to be made with MORTON'S money, and not the defendant's. HARRY said, about MORTON, "But he turned everything around and said he came up with his own money and everything and that he would be able to do something" (46). MORTON obtained the funds for the second buy by selling pharmaceutical cocaine he got in Philadelphia and, when he was still short of funds, having his wife fly up from Washington with additional money. (47-8).

When HARALAMBUS was about to testify to a comment that MORTON made in connection with the drugs purchased in this second transaction, defense counsel objected. The Court's comment is right to the point:

> Well, I don't think that there has been a connection at this point of the transaction with Mr. Williams(53).

MORTON'S plan was to have the drugs sold in New York City, not in Washington, as the first transaction had involved (53).

The first attempt to sell the drugs went awry when the potential purchaser, Pearl, rejected the second consignment because it was of inferior quality (54). The three partners (HARALAMBUS, MORTON, and MIKEDES) next attempted to return the drugs to DURSO, who rejected the complaint emphatically (55). Next, they cut the quarter-pound of cocaine into quarter-ounce and half-ounce packets and retailed some of it in New York City (56).

MIKEDES picked up the story and corroborated that the second consignment was purchased with MORTON'S money (190). MIKEDES stated that when about half the second consignment had been sold in New York he took the remaining ounce-and-a-half or so down to Washington and sold it to the defendant for $1,400.00, which MIKEDES wired to HARALAMBUS in New York (193). MIKEDES was clear that the $1,400.00 he received from WILLIAMS was the regular retail price for the quantity he sold to him (217).

3) The MORTON-MIKEDES-HARALAMBUS Conspiracy Continues.

After the sale, as a retail customer, to WILLIAMS, the three partners again bought drugs from DURSO without any thought of the defendant's participation.

Thus, in April of 1974, HARALAMBUS met with DURSO and took a third quarter-pound of cocaine (59). HARRY contacted MIKEDES and went to Washington with the thought that as HARRY put it, they would get "rid of the coke down in the Washington

area, Maryland and Virginia. And he said there would be no problem. He knew a few people who were interested". (62). From that statement it is again clear that WILLIAMS was no part of the plan for this third consignment and that HARRY and MIKEDES were still angry at him from the first time.

MIKEDES and HARRY went through with their plan to independently retail the cocaine in the Washington area. HARRY actually sold some of the cocaine to a stranger in a bar (63). Soon thereafter, entirely fortuituously, MIKEDES and HARRY encountered the defendant and ultimately sold him the balance of this third shipment.

4) The Court's Ruling

The Court quite properly dismissed the third, fourth and fifth Counts of the indictment on the grounds that there was no proper nexus between the defendant's activities, as a purchaser of the cocaine in Washington, D.C. and the venue of the District Court for the Eastern District of New York.

5) It is our contention that the Court should have dismissed the second Count of the indictment for it is obvious that the defendant was not connected with the planning or purchase by MORTON, MIKEDES and HARALAMBUS of the second consignment. WILLIAMS became involved only as a customer of last resort to whom MIKEDES turned after the drugs had been purchased and could not be returned or otherwise sold.

From the testimony of MORTON, MIKEDES and HARRY it is clear that they were all angry at the defendant for his failure to forward any of the money or communicate about the first consignment. They were at a loss as to how to finance future purchases until MORTON promised to and did come up with the funds. Clearly, the defendant was not a part of this second purchase except for a reference in the testimony which is not otherwise borne out.

That WILLIAMS had been "frozen out" of the MORTON-MIKEDES-HARALAMBUS circle is settled beyond doubt when the evidence of the third transaction is considered, where they purchased the drug, retailed part of it and dealt with WILLIAMS only after an entirely fortuitous meeting.

6) The Applicable Law.

The law is clear that when a second conspiracy is formed, of which the defendant is not a part, evidence of the transactions involving the second conspiracy are not admissable against the defendant who was not a party thereto. Kotteakos vs. United States, 328 U.S. 750; United States vs. Borelli, 336 F. 2d 376 (2nd Cir., 1964).

This Court has cautioned the United States Attorney's office to "cease combining in an alleged single conspiracy, criminal acts, loosely, if at all connected" in United States vs. Sperling, 506 F. 2d 1323 (2d Cir., 1974). Even more

recently, in United States vs. Bertolotti, 529 F. 2d 149 (2nd Cir., 1975) this Court noted that "when convictions have been obtained on the theory that all defendants were members of a single conspiracy, although, in fact, the proof discloses multiple conspiracies, the error of variance has been committed".

That the defendant must answer for his own activities is fair. To make him responsible for the acts of others who were consciously keeping him out of their business is improper. The second Count should have been dismissed.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed and the case remanded f r a new trial: Count Two should be dismissed.

Respectfully submitted,

MARTIN B. ADELMAN
Attorney for Appellant

October, 1976

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LaGRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th Rd. MASPETH, N.Y.C.

That on the 6th day of October, 1976, deponent personally served the within APPELLANT'S BRIEF upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

MICHAEL J. REMINGTON
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Robert La Grassa

Sworn to before me this

6th day of October, 19 76.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978